IN THE

Supreme Court of the United States

October Term, 1977
No. 77-687

RICHARD MEREDITH,

Petitioner,

vs.

WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA; STATE OF CALIFORNIA, DIVISION OF FORESTRY, DEPARTMENT OF CONSERVATION RESOURCES AGENCY; and DEPARTMENT OF CORRECTIONS,

Respondents.

Petition for a Writ of Certiorari to Review a Judgment of the Supreme Court of the State of California.

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SUBJECT INDEX

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Petition for a Writ of Certiorari to Review a Judgment of the Supreme Court of the State of California.

Petitioner, Richard Meredith, prays that a Writ of Certiorari issue to review the judgment of the California Supreme Court entered on August 16, 1977 and the denial of a Petition for Rehearing entered on September 15, 1977.

Opinion Below.

The matter was determined by the Supreme Court of the State of California, following decision by the Court of Appeal of the State of California. The Supreme Court issued a written opinion dated August 16, 1977 with a dissenting opinion of the same date. A Petition for Rehearing was denied by the Supreme Court, with-

out opinion, on September, 15, 1977. The unanimous decision of the Court of Appeal in favor of the Petitioner was entered on July 13, 1976.

A copy of the opinion of the Supreme Court, the dissenting opinion, and the opinion of the Court of Appeal, are appended hereto.

Jurisdiction.

Jurisdiction of this Court is invoked, pursuant to 28 U.S.C. § 1257(3) and is based on the ground that the California Supreme Court, in its decision reversing the Court of Appeal of the State of California, and its denial of rehearing, the highest court of the State, has determined against the validity of the Federal right, privilege and immunity granted to Petitioner under the Fourteenth Amendment of the Constitution of the United States and his right to equal protection of the law, and due process of law.

Constitutional and Statutory Provisions Involved.

Constitution of the United States, Fourteenth Amendment, Section 1.

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Labor Code, State of California.

"§ *4453. Average annual earnings: Computation*

Except as provided in Section 4453.1, in computing average annual earnings for the purposes of temporary disability indemnity and permanent total disability indemnity only, the average weekly earnings shall be taken at not less than fifty-two dollars and fifty cents ($52.50) nor more than one hundred seventy-eight dollars and fifty cents ($178.50). In computing average annual earnings for purposes of permanent partial disability indemnity, the average weekly earnings shall be taken at not less than thirty dollars ($30) nor more than one hundred five dollars ($105). Between these limits the average weekly earnings, except as provided in Sections 4456 to 4459, shall be arrived at as follows:

. . .

(d) Where the employment is for less than 30 hours per week, or where for any reason the foregoing methods of arriving at the average weekly earnings cannot reasonably and fairly be applied, the average weekly earnings shall be taken at 100 percent of the sum which reasonably represents the average weekly earning capacity of the injured employee at the time of his injury, due consideration being given to his actual earnings from all sources and employments."

Labor Code, State of California.

"§ *3365. Person engaged in suppressing fire: Status as employee of public entity entitled to compensation: Exclusion of members of armed*

forces and aircraft contractors and employees thereof

For the purposes of this division:

(a) Notwithstanding Sections 2700, 2766, and 2791 of the Penal Code, except as provided in subdivisions (b) and (c), each person engaged in suppressing a fire pursuant to Section 4153 or 4436 of the Public Resources Code, and each person (other than an independent contractor or an employee of an independent contractor) engaged in suppressing a fire at the request of a public officer or employee charged with the duty of preventing or suppressing fires, is deemed, except when the entity is the United States or an agency thereof, to be an employee of the public entity that he is serving or assisting in the suppression of the fire, and is entitled to receive compensation from such public entity in accordance with the provisions of this division. When the entity being served is the United States or an agency thereof the State Department of Corrections shall be deemed the employer and the cost of workmen's compensation may be considered in fixing the reimbursement paid by the United States for the service of prisoners. A person is engaged in suppressing a fire only during the period he (1) is actually fighting the fire, (2) is being transported to or from the fire, or (3) is engaged in training exercises for fire suppression.

(b) A member of the armed forces of the United States while serving under military command in suppressing a fire is not an employee of a public entity.

(c) Neither a person who contracts to furnish aircraft with pilots to a public entity for fire prevention or suppression service, nor his employees, shall be deemed to be employees of the public entity; but a person who contracts to furnish aircraft to a public entity for fire prevention or suppression service and to pilot the aircraft himself shall be deemed to be an employee of the public entity."

"§ 4458. Volunteer fire department member, or person engaged in fire suppression, suffering injury or death in performance of duty: Average weekly earnings: Four times annual earnings: Inmate of penal institution

(a) Except as provided in subdivision (b), if a member registered as an active firefighting member of any regularly organized volunteer fire department as described in Section 3361 suffers injury or death while in the performance of his duty as fireman, or if a person engaged in fire suppression as described in Section 3365 suffers injury or death while so engaged, then, irrespective of his remuneration from this or other employment or from both, his average weekly earnings for the purposes of determining temporary disability indemnity and permanent disability indemnity shall be taken at the maximum fixed for each, respectively, in Section 4453. Four times his average annual earnings in disability cases and in death cases shall be taken at the maximum limits provided in Sections 4452 and 4702 respectively.

(b) In the case of an inmate of a penal or correctional institution who is deemed to be an employee under Section 3365, irrespective of his

remuneration, his average weekly earnings for the purposes of determining temporary disability indemnity and permanent disability indemnity shall be taken at the minimum fixed for each, respectively, in Section 4453. Four times his average annual earnings in disability cases shall be taken at the minimum limit provided in Section 4452.

(c) An inmate of a state penal or correctional institution who is deemed to be an employee under Section 3365 is not entitled to receive benefits under this division during the period he is confined in such institution, and the actual period of his confinement after the injury shall be offset against the period for benefits to which he is entitled under this division. Upon parole or release from the state penal or correctional institution, the inmate is entitled to such benefits for the remainder of the benefit period not so offset."

Questions Presented.

1. Whether, contrary to the Fourteenth Amendment to the Constitution of the United States, a prisoner who has been assigned to firefighting duties, and who is found to be covered by the Workers' Compensation Laws of the State, and who becomes totally disabled from an accident during said duties, may be singled out from all other workers so industrially injured in said State, and be limited to the minimum benefits of said law upon his release from imprisonment?

2. Is the right of Petitioner to the equal protection of the law violated by the California law limiting him to minimum benefits provided by the California Workers' Compensation Act where injured workers of

all other classes are entitled to prove greater earning capacity entitling them to higher benefits?

3. Is the right of Petitioner to the equal protection of the law violated by the California statute applying to him a conclusive presumption of minimum benefits that applies to no other class of injured workers covered by the California Workers' Compensation Act and where, in fact, California law directs maximum benefits be granted all other injured firefighters?

4. Is Petitioner, solely by reason of temporary incarceration, denied equal protection of the law by a conclusive presumption of minimum earning capacity when he is capable of proving greater earning capacity under otherwise applicable state law generally applied in determining earning capacity?

5. Where California law provides that earning capacity for the purpose of determining the level of permanent disability benefits is to be based on the long term earning history of the injured employee, is Petitioner denied equal protection and due process of the law by a conclusive presumption of minimum earnings solely by reason of his temporary incarceration?

Statement of the Case.

Richard Meredith, while a 36-year-old state prison inmate, was assigned to a firefighting crew and on April 16, 1974, was struck by a falling tree on private property and from said injuries became permanently, totally disabled and confined to a wheelchair by paraplegia. Under the provisions of California Labor Code Section 3365, he was deemed to be an employee covered by the State's Workers' Compensation laws and benefits.

Said benefits (excepting medical care) under California law cannot be paid until such a prisoner is discharged from detention.

Payment to injured workers in California is made for permanent disability on a weekly basis. In the case of permanently, totally disabled injured workers, California law directs payment for life in an amount to be determined under the provisions of Labor Code Section 4453. Such payments, as applied to Petitioner, range from a minimum of $35.00 per week to a maximum of $119.00 per week. The determination of amount is directed by Labor Code Section 4453 to be made in various ways, depending upon the facts of the case. In the case of Petitioner, the Workers' Compensation Judge found that the reasonable value of petitioner's work at the time of his injury was "maximum" and Petitioner was entitled to weekly benefits for life at the rate of $119.00 per week upon his discharge from detention (which occurred shortly after his injury and discharge from hospitalization).

The Workers' Compensation Appeals Board of the State of California reversed the opinion of the Hearing Judge on the ground that Labor Code Section 4458 directs that all persons engaged in firefighting shall be provided maximum benefits excepting an inmate of a penal or correctional institution whose benefits shall conclusively be presumed to be at a minimum rate. This presumption or decree of minimum benefits is the only such provision in the Workers' Compensation laws of California, and no other employee of any nature, covered by the Workers' Compensation laws of the State is thus limited. All other injured workers have the right to prove the reasonable value of their services.

The constitutionality of Labor Code Section 4458 was raised before the Hearing Judge and at all stages of the litigation.

Following the reversal of the Hearing Judge by the Workers' Compensation Appeals Board of the State of California, a Petition for Writ of Review was filed by Petitioner with the Court of Appeal of the State. That Court reversed the Workers' Compensation Appeals Board and in its unanimous opinion, found Labor Code Section 4458(b), which fixes a prisoner's compensation benefits as minimum, unconstitutional on the grounds that, "Once a prisoner is released or paroled he will enter the general labor market and compete for employment, and we can perceive no rational basis for distinguishing between a disabled state prisoner who has been released or paroled and other persons."

Respondents filed a Petition for Hearing in the Supreme Court of the State of California and, in a 5-2 decision, with written majority and dissenting opinions, the Supreme Court of California reversed the Court of Appeal and on September 15, 1977, denied Petitioner a Request for Rehearing, exhausting Petitioner's remedies before the courts of the State of California.

REASONS FOR GRANTING THE WRIT.

A. The State Statute Constitutes Impermissible Class Legislation.

The Labor Code sections cited limit any prisoner engaged in firefighting to minimum permanent disability benefits despite the extent of his injury or the reasonable value of his services. The sections make no distinction between injuries sustained inside a prison or (as here), a prisoner released from prison who is engaged in such work on private property doing work usually performed by private, civilian employees. Here the applicant sustained permanent, total disability felling a dead tree on private property found to be a fire hazard. This work was done by such fire-camp prison labor where the landowner failed to have such fire hazard removed.

Effective on April 1, 1974 (prior to Petitioner's injury), the legislature recognized the peculiar problems of totally disabled, industrially injured employees. Labor Code Section 4453 was amended so that, in effect, such an injured worker could be awarded $119.00 per week for life at maximum, a rate applying *only* to totally, permanently disabled workers. But, in such amendment, the legislature excepted, *inter alia,* workers specified in Labor Code Section 4458(b) which reads:

> "In the case of an inmate of a penal or correctional institution who is deemed to be an employee under Section 3365, irrespective of his remuneration, his average weekly earnings for the purposes of determining temporary disability indemnity and permanent disability indemnity shall be taken at the minimum fixed for each, respectively, in Section 4453. Four times his average annual earnings

> in disability cases shall be taken at the minimum limit provided in Section 4452."

Thus, your Petitioner as being deemed an employee under Section 3365 is limited to minimum earnings and a minimum compensation rate under any and all circumstances, even though totally and permanently disabled.

The question thus is presented as to whether your Petitioner, now released and living as a private citizen, can reasonably be classified differently from other permanently, totally disabled injured workers without violation of his right to the equal protection of the law.

It certainly cannot be said the Petitioner's problems of rehabilitation are less than his fellow totally disabled persons. If anything, with his prison record, his rehabilitation problems are greater. His problem of economically surviving is the same as any other such unfortunate person. To classify him, as the State has done, is to condemn him to a life on welfare and public assistance. And it is also to make him a burden on the public instead of giving him the same economic and rehabilitation opportunities as other such disabled persons.

It is crucial to emphasize the basis upon which the State of California calculates permanent disability benefits. The factors to be considered are not the immediate earnings of the injured worker at the time the worker sustains the injury, but the long term earning history of the worker which is a guide in predicting earning capacity.[1] Thus, we have the bitter anomaly of a volunteer firefighter who may have been a derelict

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[1] *Argonaut v. Industrial Accident Commission,* 75 Cal.2d 589, 598.

all of his life and who is injured and is conclusively presumed to have maximum earning capacity and, on the other hand, we may have an incarcerated prisoner confined for violating the state antitrust law with an otherwise spotless record of maximum earning capacity and yet, as to him, the presumption is conclusive that his earning capacity was minimum.

Two tests have been applied in dealing with alleged violations of equal protection. Where the statute discriminates against a "suspect class" of persons or limits a "fundamental right", a compelling state interest must be shown to overcome the heavy presumption of unconstitutionality.[2] Where neither of these factors is present, the state need only have a rational basis for differences in classifications.

In recent years there has been an expansion as to what groups will be considered "suspect". The most obvious deal with race,[3] national origin,[4] and alienage.[5] Less obvious but receiving considerable attention are indigents,[6] women,[7] and illegitimates.[8] Because of recent developments centered around prison reforms and strict judicial scrutiny concerning deprivation of inmates' civil rights, an extension of inmates as a "suspect class" has developed.

Courts and legislatures have begun to view inmates as an inherently disadvantaged group. In *Procunier*

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[2]*Shapiro v. Thompson*, 394 U.S. 618 (1969).

[3]*Brown v. Board of Education*, 347 U.S. 483.

[4]*Oyama v. California*, 332 U.S. 633.

[5]*Graham v. Richardson*, 403 U.S. 365.

[6]*Griffin v. Illinois*, 351 U.S. 12.

[7]*Geduldig v. Aiello*, 417 U.S. 484.

[8]*Gomez v. Perez*, 409 U.S. 535.

v. Martinez,[9] the issue before the Court was the constitutionality of regulations which authorized the censorship of prisoner mail. It concluded that the First Amendment was violated by these censorship rules unless the prison officials could establish a procedure whereby the legitimate state interests of security, order and rehabilitation could be accomplished without suppressing First Amendment rights. In characterizing the subjects of the First Amendment rights, the Court stated:

> "The District Court stated the issue in general terms as 'the applicability of First Amendment Rights to prison inmates, . . .' 354 F. Supp., at 1096, and the arguments of the parties reflect the assumption that the resolution of this case requires an assessment of the extent to which *prisoners* may claim First Amendment freedoms. *In our view this inquiry is unnecessary.* In determining the proper standard of review for prison restrictions on inmate correspondence, we have no occasion to consider the extent to which an *individual's* right to free speech survives incarceration. . . ." (Emphasis added).

The implications of this language are clear. The Court is recognizing that prisoners are still individuals, yet the circumstances of their incarceration makes them "particularized".

Viewing inmates in this disadvantaged group, there is no compelling state interest in depriving these people of the maximum benefits accorded other persons similarly situated. The only apparent interest the state

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[9]416 U.S. 396 (1974).

has in the classification is fiscal. This, however, is not compelling. In *Shapiro v. Thompson,*[10] the Court said:

> "We recognize that a state has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a state may not accomplish such a purpose by invidious distinctions between classes of its citizens."

As to fundamental rights, *Shapiro* alludes to "food, shelter and other necessities of life." The case was decided, however, on the fundamental right of interstate travel. As to what exactly are fundamental rights is unclear and depends upon the factual situation in each case.

> "What emerges from the new equal protection cases is an extremely flexible sliding scale for measuring the required degree of intensity of judicial scrutiny of the legislative classification. . . . The more the victims of legislative classification appear to be disadvantaged, the less need there is for their interests to be basic. So also the judiciary can be expected to give 'close scrutiny' to the alleged invasion of a right it regards as fundamental, even when the claimant's assertion that he is disadvantaged is less than persuasive. The result, in either type of case, is not that the claim of constitutional right is absolute, but that it will prevail unless it is outweighed by a strong showing of justification by the state."

[10]394 U.S. 618.

> Karst, *Invidious Discrimination: Justice Douglas and The Return of the "Natural Law Due Process Formula"*, 16 UCLA L.Rev. 716, 744 (1969).

The facts of this case demonstrate the immediate need for granting fundamental right status to prisoners, *especially once they have been released.* Petitioner was imprisoned to punish him for an unlawful act he committed several years ago. He was placed in an institutional environment, deprived of most of the privileges shared by other human beings. In the course of doing his time, Petitioner worked for the State and while engaged in fire suppression activities was injured and permanently totally disabled. Once out of prison and after having satisfied his debt to the State for an error he committed in the past, he is told that he still is to be treated differently from other such disabled persons. The State is depriving him of the fundamental privilege of being treated equally with others like himself by carving out a special class of persons, namely ex-convicts, and giving to that class less than other people receive. The law requires Petitioner to give a part of his life to society in repayment of a wrong committed. He should not also be required to give up his body without adequate compensation for that loss. To uphold such laws is to deprive Petitioner of equal protection of the law.

B. The Conclusive Presumption of Minimum Earning Capacity Likewise Violates the Equal Protection and Due Process Clause.

As Petitioner has indicated, the basic California statute predicates permanent disability benefits upon long-range earning capacity. However, as to volunteer firefighters, the State establishes two conclusive presumptions. First, that the non-prisoner has maximum earning capacity although there may be no evidence whatsoever to support such a presumption; and second, that the confined volunteer firefighter has minimum earning capacity although there may be no evidence to justify such a conclusion.

As your Honorable Court has noted with regularity, permanent, irrebuttable presumptions have long been disfavored under the Due Process Clause of the Fifth and Fourteenth Amendments.[11]

To bar the Petitioner who is now a paraplegic by reason of his volunteering for job service the right to an evidentiary hearing on his earning capacity, is not justified by any governmental interest. Mr. Justice Marshal has put Petitioner's argument better than Petitioner could himself:[12]

> "In short, where the private interests affected are very important and the governmental interest can be promoted without much difficulty by a well-designed hearing procedure, the Due Process Clause requires the Government to act on an individualized basis, with general propositions serving only as rebuttable presumptions or other burden-shifting devices. That, I think, is the import of *Stanley v. Illinois,* 405 U.S. 645, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972)."

[11]*Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 644; *Vlandis v. Kline,* 414 U.S. 441, 446.

[12]Marshal, J. Concurring, *U.S. Department of Agriculture v. Murry,* 413 U.S. 508, 518.

For the foregoing reasons, it is submitted that this petition should be granted and the judgment of the Supreme Court of California be annulled.

Respectfully submitted,

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APPENDIX.

Opinion of the Supreme Court of the State of California.

In the Supreme Court of the State of California.

Richard Meredith, Petitioner, v. Workers' Compensation Appeals Board, Department of Conservation Resources Agency et al., Respondents. L.A. 30689.

Filed: Aug. 16, 1977.

While committed to the custody of the Department of Corrections, petitioner was totally disabled during fire prevention activities for the Division of Forestry. The workers' compensation judge awarded him disability compensation at the maximum rate of $119 per week, commencing upon release from prison, and lifetime medical care. The Workers' Compensation Appeals Board confirmed the award of lifetime care but fixed disability at the minimum compensation rate of $35 per week. After denial of petition for reconsideration, petitioner sought review.

Petitioner does not dispute that at times relevant here Labor Code section 4458, subdivision (b), provided for a minimum award.[1] Rather, he contends the limitation denied him equal protection of the law.

Permanent disability benefits are based on the nature and extent of disability and on earnings. Within the statutory minimum and maximum range, the earnings component is fixed on the basis of actual earnings at time of injury unless employment is for less than 30 hours a week or unless prior earnings cannot be reasonably and fairly applied. (Lab. Code, § 4453.) In the latter situation, earning capacity—including po-

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[1]Section 4458 has since been amended. (Stats. 1976, ch. 1347, § 7.)

tential future earnings—shall be considered. (Goytia v. Workmen's Comp. App. Bd. (1970) 1 Cal.3d 889, 894 et seq.; Goytia v. Workmen's Comp. App. Bd. (1972) 6 Cal.3d 660, 663 et seq.)

Former Labor Code section 4458 established special rules for purposes of computing the disability compensation of volunteer firefighters. Subdivision (a) provided the earnings component for nonconvict firefighters shall be fixed at maximum irrespective of his earning from firefighting or other employment. Subdivision (b) provided the earnings component of convict earnings shall be at minimum, and subdivision (c) provided the convict shall receive no compensation benefits while confined in a penal institution.[2]

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[2]Section 4458 provided: "(a) Except as provided in subdivision (b), if a member registered as an active firefighting member of any regularly organized volunteer fire department as described in Section 3361 suffers injury or death while in the performance of his duty as fireman, or if a person engaged in fire suppression as described in Section 3365 suffers injury or death while so engaged, then, irrespective of his remuneration from this or other employment or from both, his average weekly earnings for the purposes of determining temporary disability indemnity and permanent disability indemnity shall be taken at the maximum fixed for each, respectively, in Section 4453. Four times his average annual earnings in disability cases and in death cases shall be taken at the maximum limits provided in Sections 4452 and 4702 respectively. [¶] (b) In the case of an inmate of a penal or correctional institution who is deemed to be an employee under Section 3365, irrespective of his remuneration, his average weekly earnings for the purposes of determining temporary disability indemnity and permanent disability indemnity shall be taken at the minimum fixed for each, respectively, in Section 4453. Four times his average annual earnings in disability cases shall be taken at the minimum limit provided in Section 4452. [¶] (c) An inmate of a state penal or correctional institution who is deemed to be an employee under Section 3365 is not entitled to receive benefits under this division during the period he is confined in such institution, and the actual period of his confinement after the injury shall be offset against the period for benefits to which he is entitled under this division. Upon parole or release from the state penal or correctional institution, the inmate is entitled to such benefits for the remainder of the benefit period not so offset."

Categorization of incarcerated convicts from other members of society does not create a suspect classification invoking the strict scrutiny doctrine. In Sail'er Inn v. Kirby (1971) 5 Cal.3d 1, 18, this court pointed out the characteristics of a suspect classification: "Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth. What differentiates sex from nonsuspect statuses, such as intelligence and physical disability, and aligns it with the recognized suspect classifications is that the characteristic frequently bears no relation to ability to perform or contribute to society."

The status of a prisoner following conviction as a result of legal processes is not an immutable trait; the status bears "a relationship to ability to perform or contribute to society." (Cf. In re Harrell (1970) 2 Cal.3d 675, 693.) In a similar situation, our courts—rejecting equal protection challenge to statutes limiting prisoner recovery for personal injury against the state—have refused to find a suspect classification. (Hughes v. San Diego County (1973) 35 Cal.App.3d 349, 351-353; Reed v. City & County of San Francisco (1965) 233 Cal.App.2d 23, 24-25.) The strict scrutiny doctrine is not applicable. Rather, the rational relationship test is applied in determining equal protection challenges to prisoner classification for purposes of governmental liability for injury. (*Id.*; cf. County of Los Angeles v. Superior Court (1965) 62 Cal.2d 839, 846; Corning Hospital Dist. v. Superior Court (1962) 57 Cal.2d 488, 496.) The same test has been applied in determining equal protection challenges to benefit

classifications under the Workers' Compensation Act. (Mathews v. Workmen's Comp. App. Bd. (1972) 6 Cal.3d 719, 738-740; Western Indemnity Co. v. Pillsbury (1915) 170 Cal. 686, 702-703; Saal v. Workmen's Comp. App. Bd. (1975) 50 Cal.App.3d 291, 300.)

" 'Wide discretion is vested in the Legislature in making the classification and every presumption is in favor of the validity of the statute; the decision of the Legislature as to what is a sufficient distinction to warrant the classification will not be overthrown by the courts unless it is palpably arbitrary and beyond rational doubt erroneous. [Citations.] A distinction in legislation is not arbitrary if any set of facts reasonably can be conceived that would sustain it.' We presume the legislative classification is valid and will sustain it 'unless it is manifestly without support in reason.' (*Western Indemnity Co. v. Pillsbury, supra,* 170 Cal. 686, 702.)" (Mathews v. Workmen's Comp. Appeals Bd., *supra*, 6 Cal.3d 719, 739.)

Unless arbitrary, the fictitious earnings components must be upheld. Considerations of public policy and equality justify the legislative distinctions. Cognizant of the public service provided by the volunteer civilian firefighter and the potential loss of his earnings from other employment, the Legislature determined that the usual benefit schedules should not apply but that a fictitious earnings component should be used. The liberal disability compensation program not only serves to counterbalance any sacrifice of earning power made to engage in firefighting activity, but also provides an incentive to engage in an important public service. Within the Legislature's broad discretion in fixing compensation benefits, it is obviously proper to pay fire-

fighter disability compensation at the maximum scale regardless of actual earnings.

Firefighting does not deprive prisoners of the opportunity for earnings, and incentives exist for prisoners to engage in firefighting not applicable to nonprisoners. The Department of Corrections requires prisoners to work for compensation of between 2 cents and 35 cents per hour (Pen. Code, § 2700), and engaging in firefighting not only satisfies the work requirement but also helps to demonstrate the prisoner's desire to assume a productive role in society.

Nevertheless, recognizing the importance of prisoner firefighters, the Legislature determined to give them some disability benefits in contrast to most other working prisoners who were excluded from the workers' compensation system. (Former Pen. Code, §§ 2700, 2766, 2791.)[3]

While elevating prisoner firefighters above the basic prisoner exclusion, and providing full medical benefits and rehabilitation programs (Lab. Code, §§ 139.5, 4600), the Legislature chose to limit their disability benefits. The limitation obviously is in recognition that the prisoner, having removed himself from the competitive labor market, has neither significant earnings nor earning power, and when measured by salary at time of injury—the basic test—the prisoner ordinarily could not qualify for more than minimum disability compensation. Further, the normal obstacles faced by ex-prisoners in seeking employment upon release make any attempt to use the secondary measure —his earning *capacity*—speculative. Weighing the

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[3]Penal Code sections 2700, 2766, and 2791 were amended while this case was pending. (Stats. 1976, ch. 1347, §§ 9, 10, 11.)

above considerations, it was not unreasonable for the Legislature to conclude that for compensation purposes firefighting prisoners should not be classified with other injured volunteer firemen or with other injured prisoners but rather with those injured in private employment having earnings at or below the minimum.[4] Indeed, granting prisoner firefighters benefits in excess of non-prisoner workers suffering similar injury might be difficult to justify.

The award is affirmed.

Clark, *J.*

We concur:

Richardson, *J.*
Sullivan, *J.**
Wright, *J.***
Files, *J.****

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[4]Petitioner also claims that Labor Code section 4458, subdivision (b), has been repealed by implication based on the 1973 amendment to Labor Code section 4453. That section in its first paragraph sets forth the maximum and minimum limits of earnings for purposes of temporary and permanent disability indemnity, and in the last sentence provides, "Between those limits the average weekly earnings, except as provided in sections 4456 to 4459, shall be arrived at as follows: . . ." The quoted provision was not changed by the amendment, and since section 4458 is expressly excepted from the provisions of section 4453, amendments to the latter section do not repeal the former.

*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

**Retired Chief Justice of the Supreme Court sitting under assignment by the Acting Chairman of the Judicial Council.

***Assigned by the Chairman of the Judicial Council.

DISSENTING OPINION BY MOSK, J.

I dissent.

This petitioner is no longer confined to prison but remains a paraplegic as a result of injuries suffered as a firefighter while in prison. I cannot agree that, merely because his injuries occurred while a prisoner, he is now and for the remainder of his life will be entitled to only a fraction of the benefits afforded to a firefighter who suffered the same disability but who was not a prisoner at the time of injury.

Petitioner has paid his debt to society and he is totally disabled; thus there is no rational basis for treating him differently from others who have suffered the same disability while engaged in the same activity. To do so is to impose punitive treatment upon this petitioner not merely for the penal term provided by law but for life.

The majority suggest no valid justification for the distinction they have drawn. Their opinion simply ignores the rights of a prisoner to compensation *after* his release, and justifies its holding that the classification is reasonable by looking to the status of one who is incarcerated. Thus, the majority declare that firefighting does not deprive a *prisoner* of the opportunity for earnings (*ante*, p. 5*), and that a *prisoner* has neither significant earnings nor earning power (*ante*, p. 5**). The opinion fails to recognize that petitioner is not now a prisoner, and that his injuries have in fact deprived him of the opportunity for significant civilian earnings for life.

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*Multilith opinion page 6.

**Multilith opinion page 7.

The disregard of this crucial factor is particularly glaring since it is clear that subdivision (b) of former Labor Code section 4458 applied to compensation payments made only to prisoners *after* their release, and not to those still incarcerated. This is evident from subdivision (c) of that section, which provided that a prison inmate was not entitled to receive any benefits "during the period he is confined. . . ." Thus, the crucial question is not whether there is a rational basis for compensation distinction between a firefighter who is a prisoner and one who is not, but rather, whether a radical difference in treatment is justified between similarly disabled persons who are not in prison, some of whom sustained their injuries while they were prisoners.

In addition to the foregoing obvious defect in the majority rationale, their opinion upholds the validity of the presumption in subdivision (b) on another questionable ground. They reason that the Legislature could have determined the future earnings of a released prisoner were too speculative a standard upon which to base earnings for compensation because of the obstacles faced by ex-convicts in seeking employment.

This rationalization is untenable for two reasons. First, it suggests that whenever the future earning capacity of an employee is speculative, if earnings at the time of injury are an inadequate measure, then the Legislature may properly presume earning capacity will be minimal. Such a presumption lacks a rational basis. We have made it abundantly clear that many factors enter into the calculus of earning capacity (see, e.g., Goytia v. Workmen's Comp. App. Bd. (1970) 1 Cal.3d 889, 894; Argonaut Ins. Co. v. Industrial

Acc. Com. (1962) 57 Cal.2d 589, 594), factors which no more justify an inflexible assumption of minimum than maximum earnings. Second, that the Legislature did not base the presumption in subdivision (b) upon the assertedly speculative character of an ex-convict's future earnings is conclusively demonstated by its enactment in 1976, subsequent to petitioner's injury, of an amendment to Labor Code section 4458 to eliminate the distinction between firefighters injured while prisoners and other volunteer firefighters.[1] Surely, the speculative nature of post-release earnings of prisoners did not dissolve overnight to justify the 1976 amendment of section 4458.

Finally, the suggestion does not withstand scrutiny—and, indeed, it is a non sequitur—that prisoners have greater incentive to undertake firefighting duties than nonprisoners because a prisoner can, by volunteering, satisfy the Department of Corrections' work requirements and demonstrate his desire for a productive role in society. First, such benefits can be gained by fulfilling work assignments far less dangerous to the prisoner's person than firefighting. And second, the WCAB does not examine the subjective motivation of other injured firefighters. Thus, this purported ration-

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[1]Section 4458, as amended in 1976, provides, "If a member registered as an active firefighting member of any regularly organized volunteer fire department as described in Section 3361 suffers injury or death while in the performance of his duty as fireman, or if a person engaged in fire suppression as described in Section 3365 suffers injury or death while so engaged, then, irrespective of his remuneration from this or other employment or from both, his average weekly earnings for the purposes of determining temporary disability indemnity and permanent disability indemnity shall be taken at the maximum fixed for each, respectively, in Section 4453. Four times his average annual earnings in disability cases and in death cases shall be taken at the maximum limits provided in Sections 4452 and 4702 respectively."

ale for a difference in treatment between the two classes of firefighters is indefensible.

In short, the majority proceed on a wholly incorrect premise in applying to this case a distinction regarding compensation for prisoners and for those not in prison. I would hold that this paraplegic victim, totally disabled for life and no longer a prisoner, must be afforded the same benefits as any other volunteer injured in the course of performing the duties of a firefighter.

Mosk, *J.*

I concur:

Tobriner, *Acting C. J.*

Opinion.

Court of Appeal, Fourth District, Second Division, State of California.

Richard Meredith, Petitioner, v. Workers' Compensation Appeals Board of the State of California; State of California, Division of Foresty, Department of Conservation Resources Agency, Legally Uninsured; and Department of Corrections, Legally Uninsured, Respondents. 4 Civil 15709 (WCAB No. 74 SBR 43394).

Filed: July 13, 1976.

PETITION for writ of review. Annulled and remanded.

Richman and Garrett and Lewis Garrett for Petitioner.

T. Groezinger, James J. Vonk, George S. Bjornsen and Richard A. Krimen for Respondent State of California, Department of Conservation Resources Agency, Division of Forestry, and Department of Corrections.

Petitioner (hereinafter "applicant") seeks review of an opinion and order denying reconsideration by the Workers' Compensation Appeals Board (hereinafter "Board") dated January 9, 1976.

Facts

On April 16, 1974, applicant was a convicted felon committed to the custody of the Department of Corrections. He was assigned to a State of California, Division of Forestry, Department of Conservation Resources Agency, forest conservation camp known as Pilot Rock, in the San Bernardino Mountains.

On April 16, 1974, while felling trees on private property, considered to be a fire danger by the Division

of Forestry, he was injured when a tree, in the process of being freed after cutting, fell on him. As a result, applicant is now a paraplegic.

The Workers' Compensation Judge found applicant covered by the Workers' Compensation Act and awarded applicant lifetime disability compensation at the maximum rate ($119 per week). Defendants Department of Corrections and the Division of Forestry, Department of Conservation Resources Agency (hereinafter "defendants"), both legally uninsured, petitioned the Board for reconsideration. The Board granted reconsideration and, in an opinion and decision after reconsideration dated November 3, 1975, confirmed the award to applicant of lifetime disability benefits, but fixed the amount thereof at minimum ($35 per week). Applicant then petitioned the Board for reconsideration. On January 9, 1976, the Board issued its opinion and order denying reconsideration.

Contentions

Applicant contends that subdivisions (b) and (c) of Labor Code section 4458 providing respectively that applicant's disability benefits should be set at minimum and that no benefits are payable during the period applicant is confined as a prisoner were impliedly repealed by the 1973 amendment to Labor Code section 4453 and that, if not, said subdivisions of Labor Code section 4458 deny applicant equal protection of laws as guaranteed by the Fourteenth Amendment to the United States Constitution and article I, section 11 of the California Constitution.

Discussion and Disposition

Section 2700 of the Penal Code directs the Department of Corrections to require every able-bodied prisoner in any state prison to work for compensation of between 2¢ an hour and 35¢ per hour. It further provides that prisoners performing such labor shall not be considered state employees and shall not be covered by the Workers' Compensation Act. (See also Pen. Code, §§2766, 2791, and 3323.)

However, Labor Code section 3365 provides that, notwithstanding sections 2700, 2766 and 2791 of the Penal Code, each person engaged in suppressing a fire at the request of a public officer or employee charged with the duty of preventing or suppressing fires is deemed to be an employee of the public entity he is serving or assisting in fire suppression and is covered by the Workers' Compensation Act.[1]

Labor Code section 4458, the text of which is set forth in the margin,[2] provides in subdivision (a) that

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[1]Labor Code section 3365 also provides in pertinent part: "A person is engaged in suppressing a fire only during the period he (1) is actually fighting the fire, (2) is being transported to or from the fire, or (3) is engaged in training exercises for fire suppression."

Recognizing that the Workers' Compensation Act must be construed liberally in favor of injured workmen (Lab. Code, §3202) both the hearing judge and the Board found applicant was "engaged in training exercises for fire suppression." While we entertain some question of the propriety of that finding, defendants have not sought review and the question is not, therefore, before us.

[2]Labor Code section 4458 provides in pertinent part:

"(a) . . . if a person engaged in fire suppression as described in Section 3365 suffers injury or death while so engaged, then, irrespective of his remuneration from this or other employment or from both, his average weekly earnings for the purpose of determining temporary disability indemnity and permament disability indemnity shall be taken at the maximum fixed for each, respectively, in Section 4453.

. . .

"(b) In the case of an inmate of a penal or correctional institution who is deemed to be an employee under Section

(This footnote is continued on next page)

if a person engaged in fire suppression within the meaning of Labor Code section 3365 suffers injury, his earnings shall be deemed to be maximum for purposes of temporary and permanent disability benefits irrespective of his actual earnings. Subdivision (b) of the same section provides that if an inmate of a penal or correctional institution who is deemed to be an employee under Labor Code section 3365 is injured, his earnings for purposes of temporary and permanent disability benefits shall be taken as minimum, irrespective of his actual remuneration. Subdivision (c) of the same section provides that an inmate of a state penal or correctional institution who is deemed to be an employee under Labor Code section 3365 is not entitled to receive benefits during the period he is confined and until his parole or release whereupon he is entitled to benefits for the remainder of the benefit period. It is subdivisions (b) and (c) of Labor Code section 4458 that applicant attacks as unconstitutional.

Implied Repealer

Labor Code section 4453 is the code section setting forth the method of computing the amount of average annual earnings for the purposes of temporary and

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3365, irrespective of his remuneration, his average weekly earnings for the purposes of determining temporary disability indemnity and permanent disability indemnity shall be taken at the minimum fixed for each, respectively, in Section 4453. . . .

"(c) An inmate of a state penal or correctional institution who is deemed to be an employee under Section 3365 is not entitled to receive benefits under this division during the period he is confined in such institution, and the actual period of his confinement after the injury shall be offset against the period for benefits to which he is entitled under this division. Upon parole or release from the state penal or correctional institution, the inmate is entitled to such benefits for the remainder of the benefit period not so offset."

permanent disability indemnity. In 1973 the Legislature amended this section (Stats. 1973, ch. 1023, p. 2028, §2, operative April 1, 1974) to increase the maximum figure for computing average annual earnings for the purposes of temporary disability and total permanent disability indemnity and to change the method of computing average earnings. Applicant's contention that subdivisions (b) and (c) of Labor Code section 4458 were thereby impliedly repealed is devoid of merit.

"Repeals by implication are not favored, and are recognized only when there is no rational basis for harmonizing two potentially conflicting laws. [Citation omitted.]" (*Fuentes v. Workers' Comp. Appeals Bd.*, 16 Cal.3d 1, 7: accord: *McNeil v. Kingsbury*, 190 Cal. 406, 409; *People v. Martin*, 188 Cal. 281, 285.) There is no irreconcilable conflict between Labor Code sections 4453 and 4458. Indeed, in the first paragraph of section 4453, there is an express exception for Labor Code sections 4456 to 4459, which include, of course, section 4458. Moreover, section 4453 is simply a general section providing for the computation of average annual earnings in most situations. Section 4458 is a specific section relating to the computation of average earnings in the case of persons involved in fire suppression. A special statute dealing expressly with the particular subject controls and takes precedence over a general statute covering the same subject. (*Fuentes v. Workers' Comp. Appeals Bd., supra*, 16 Cal.3d at p. 8; *McNeil v Kingsbury, supra*, 190 Cal. at p. 409.)

Equal Protection of Laws

Applicant correctly points out that under Labor Code section 3365 both state prisoners and other persons

may be deemed to be public employees while engaged in fire suppression. He urges that Labor Code section 4458 invidiously discriminates against state prisoners in that subdivision (b) requires that their earnings be taken at minimum and subdivision (c) provides that they are not entitled to receive any compensation while incarcerated.

"[T]he equal protection clause does not require 'Absolute equality' (*Douglas v. California, supra,* 372 U.S. 353, 357 [9 L.Ed.2d 811, 814, 83 S.Ct. 814], is not 'a demand that a statute necessarily apply equally to all persons' (*Rinaldi v. Yeager* (1966) 384 U.S. 305, 309 [16 L.Ed.2d 577, 580, 86 S.Ct. 1497]) and permits a state to 'provide for differences so long as the result does not amount to . . . an "invidious discrimination."' (*Douglas v. California, supra,* at p. 356 [9 L.Ed.2d at p. 814].) Simply stated the 'concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment.' (*Purdy & Fitzpatrick v. State of California* (1969) 71 Cal.2d 566, 578 [79 Cal.Rptr. 77, 456 P.2d 645].)

"The traditional test has been that the 'distinction drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal.' (*McDonald v. Board of Election Comrs.* (1969) 394 U.S. 802, 809 [22 L.Ed.2d 739, 745-746, 89 S.Ct. 1404].) But a stricter standard has been prescribed in cases involving 'suspect classifications' or 'fundamental interests.' (*Purdy & Fitzpatrick v. State of California, supra,* 71 Cal.2d at pp. 578-

579.) In *Westbrook v. Mihaly* (1970) 2 Cal.3d 765, 784-785 [87 Cal.Rptr. 839, 471 P.2d 487], [the court] had occasion to epitomize the standards to be applied in evaluating classifications under the equal protection clause: 'As this court has previously noted, [fn. omitted] the United States Supreme Court has tended to employ a two-level test in reviewing legislative classifications under the equal protection clause. In the area of economic regulation, the high court has exercised restraint, investing legislation with a presumption of constitutionality and requiring merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose. (See *McDonald v. Board of Election Comrs.* (1969) 394 U.S. 802, 809 [22 L.Ed.2d 739, 745-746, 89 S.Ct. 1404]; *McGowan v. Maryland* (1961) 366 U.S. 420, 425-426 [6 L.Ed.2d 393, 398-399, 81 S.Ct. 1101].) [Par.] On the other hand, in cases involving "suspect classifications" or touching on "fundamental interests," [fns. omitted] the court has adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny. (See *Shapiro v. Thompson, supra,* 394 U.S. 618, 638 [22 L.Ed.2d 600, 617, 89 S.Ct. 1322]; *Sherbert v. Verner* (1963) 374 U.S. 398, 406 [10 L.Ed.2d 965, 971-972, 83 S.Ct. 1790]; *Skinner v. Oklahoma, supra,* 316 U.S. 535, 541 [86 L.Ed. 1655, 1660, 62 S.Ct. 1110]; see also *Developments in the Law—Equal Protection* (1969) 82 Harv.L.Rev. 1064, 1120-1131.) Under the strict standard applied in such cases, the state bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose.' (See *Castro v. State of California* (1970) 2 Cal.3d 223, 234-236

[85 Cal.Rptr. 20, 466 P.2d 244].)" (*In re Antazo*, 3 Cal.3d 100, 110-111; see also *Estate of Horman*, 5 Cal.3d 62, 75.)

Applicant urges that distinguishing between state prisoners who are deemed to be public employees under Labor Code section 3365 and other persons who are deemed to be public employees under the same code section creates a "suspect classification" and that the right to receive workers' compensation is a "fundamental interest" and that, therefore, the "strict scrutiny" test is applicable in determining applicant's equal protection challenge.

Not so. "No case has held that prisoners comprise a suspect class nor has it been held that the right to receive workmen's compensation is a fundamental interest. Under these circumstances, the strict scrutiny analysis is not applicable to the denial of workmen's compensation prisoners." (*Granting Workmen's Compensation Benefits to Prison Inmates*, 46 So.Cal.L.Rev. 1223, 1251 [fns. omitted]; cf. *Mathews v. Workmen's Comp. Appeals Bd.*, 6 Cal.3d 719, 738-739 [applying the rational basis test to a claim of invidious discrimination involving workers' compensation benefits].) "In the field of economic regulation equal protection ordinarily requires only that there be a reasonable relationship between the classifications drawn and the purpose for which they are made. (See, e.g., *Rinaldi v. Yeager* (1966) 384 U.S. 305, 308-309 [16 L.Ed.2d 577, 579-580, 86 S.Ct. 1497]; *Dandridge v. Williams* (1970) 397 U.S. 471 [25 L.Ed.2d 491, 90 S.Ct. 1153, 1161-1163].)" (*Wood v. Public Utilities Commission*, 4 Cal.3d 288, 294; see also *Serrano v. Priest*, 5 Cal.3d 584, 597.)

We presume the state interest in prohibiting compensation to a state prisoner during the period of his incarceration is to conserve the fiscal resources of the state. The distinction between state prisoners and other persons deemed to be public employees under Labor Code section 3365 is rationally related to the presumed state interest. The purpose of the payment of workers' compensation is to permit an injured employee to exist without being a burden to others. (1 Larson, Workmen's Compensation Law (1972) §2.50; see also 2 Hanna, Cal. Law of Employee Injuries and Workmen's Compensation (2d ed.) §1.05[5][a].) In the case of a state prisoner, the state is already providing the necessities of life, and there is no need for the payment of compensation so long as incarceration continues. Since there is a rational basis for the distinction between state prisoners and other persons deemed public employees under Labor Code section 3365, we hold that the provisions of subdivision (c) of Labor Code section 4458 disallowing the payment of compensation to a state prisoner during the period of his incarceration are constitutional.

It is otherwise, however, with respect to subdivision (b) of Labor Code section 4458 providing that a state prisoner's compensation be fixed at minimum irrespective of his actual remuneration. Once a prisoner is released or paroled he will enter the general labor market and compete for employment, and we can perceive no rational basis for distinguishing between a disabled state prisoner who has been released or paroled and other persons.

Defendants appear to contend that inasmuch as the state could deny state prisoners workers' compensation

benefits entirely, it may grant such benefits on any terms it deems appropriate. In defendants' words: "What the Legislature gives, the Legislature may take away." Assuming, without deciding, that the state could constitutionally deny state prisoners all workers' compensation coverage (but see *Granting Workmen's Compensation Benefits to Prison Inmates, supra,* 46 So.Cal.L.Rev. at pp. 1249-1261), it does not follow that it may grant coverage in such a way as to invidiously discriminate against a certain class, here state prisoners. (Cf. *Griffin v. Illinois,* 351 U.S. 12, 18 [100 L.Ed. 891, 898, 76 S.Ct. 585]; *Bulluck v. Washington,* 468 F.2d 1096, 1106 (D.C. Cir. 1972).)

Defendants urge that the provisions of subdivision (b) of Labor Code section 4458 fixing a state prisoner's average earnings at minimum are sound because "[i]t is petitioner's employment status on the date of injury that is controlling in computing both his benefits under Workers' Compensation Law and the time those benefits are to be paid and not his status in the future." Defendants' assertion is incorrect. The concept of average earnings relates to earning capacity, not necessarily actual earnings. (*Goytia v. Workmen's Comp. Appeals Bd.,* 6 Cal.3d 660, 661-663; *Goytia v. Workmen's Comp. App. Bd.,* 1 Cal.3d 889, 894-895; *Pascoe v. Workmen's Comp. Appeals Bd.,* 46 Cal.App.3d 146, 153.) "Earning capacity is not locked into a straitjacket of the actual earnings of the worker at the date of injury; the term contemplates his general over-all capability and productivity; the term envisages a dynamic, not a static, test and cannot be compressed into earnings at a given moment of time." (*Goytia v. Workmen's Comp. App. Bd., supra,* 1 Cal.3d at p. 894; see also *Goytia v. Workmen's Comp. Appeals Bd., supra,* 6

Cal.3d at p. 663; *Pascoe v. Workmen's Comp. Appeals Bd., supra,* 46 Cal.App.3d at p. 153.)

Obviously, a state prisoner's actual remuneration of between 2¢ an hour and 35¢ an hour (Pen. Code, §2700) does not accurately establish his average earning capacity. No rational basis has been suggested and we perceive none that would justify fixing a state prisoner's average earnings at minimum when he is employed in fire suppression work and is deemed a public employee pursuant to Labor Code section 3365 when other persons coming within that statute have their average earnings set at maximum. We therefore hold that subdivision (b) of Labor Code section 4458, which so provides, is unconstitutional as denying equal protection of laws.

Although no party argues the point, the question arises whether subdivision (b) of Labor Code section 4458 which we hold unconstitutional is severable from subdivisions (a) and (c) of section 4458. "The test of severability is whether the invalid parts of the statute can be severed from the otherwise valid parts without destroying the statutory scheme, or the utility of the remaining provisions." (*Blumenthal v. Board of Medical Examiners,* 57 Cal.2d 228, 238; *People v. Barksdale,* 8 Cal.3d 320, 333; *Curtis v. Board of Supervisors,* 7 Cal.3d 942, 964.) Eliminating subdivision (b) does not destroy the legislative scheme. An injured state prisoner deemed to be a public employee pursuant to Labor Code section 3365 will still not receive compensation during the period of his incarceration. When he is released or paroled he will commence receiving compensation for the unexpired period for which he otherwise would have received such compensation. His compensation, however, will be at the maximum rate

pursuant to subdivision (a) of Labor Code section 4458 rather than minimum pursuant to subdivision (b). The overriding interest of the Legislature was to encourage fire suppression work by affording workers' compensation benefits to injured firefighters. That legislative objective is promoted by retaining subdivisions (a) and (c) of Labor Code section 4458 rather than invalidating the entire section.

The Board's opinion and order denying reconsideration dated January 9, 1976, is annulled, and the matter is remanded to the Board for further proceedings consistent with this opinion.[3]

CERTIFIED FOR PUBLICATION.

Kaufman, *J.*

We concur:

Tamura, *Acting P. J.*

Fogg, *J.**

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[3]In its opinion and decision after consideration dated November 3, 1975, after having given notice of its intention to do so (see *Beloud, Inc. v. Workers' Comp. Appeals Bd.*, 50 Cal.App.3d 729, 734) the Board reduced applicant's attorneys' fees from $5,000 to $1,500. Upon remand the Board may reconsider the amount of attorney fees in view of the greater recovery and the additional services rendered in connection with this review proceeding.

*Retired Judge of the Superior Court assigned by the Chairman of the Judicial Council.

Subject Index

Table of Authorities Cited

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-687

RICHARD MEREDITH,
Petitioner,

vs.

WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA; STATE OF CALIFORNIA, DIVISION OF FORESTRY, DEPARTMENT OF CONSERVATION RESOURCES AGENCY; and DEPARTMENT OF CORRECTIONS,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI
to Review a Judgment of the Supreme Court of the State of California

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Fourteenth Amendment, Section 1

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State

wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Labor Code, State of California

"§4453. *Average annual earnings: Computation*[1]

In computing average annual earnings for the purposes of temporary disability indemnity and permament total disability indemnity only, the average weekly earnings shall be taken at not less than fifty-three dollars and eighty-four cents ($53.84) nor more than one hundred seventy-eight dollars and fifty cents ($178.50). In computing average annual earnings for purposes of permanent partial disability indemnity, the average weekly earnings shall be taken at not less than thirty dollars and seventy-seven cents ($30.77) nor more than one hundred five dollars ($105). Between these limits the average weekly earnings, except as provided in Sections 4456 to 4459, shall be arrived at as follows :

(a) Where the employment is for 30 or more hours a week and for five or more working days a week, the average weekly earnings shall be 100 percent of the number of working days a week times the daily earnings at the time of the injury.

[1]Statute in effect on April 16, 1974. Stats. 1973 ch. 1023 §2. Operative April 1, 1974.

(b) Where the employee is working for two or more employers at or about the time of the injury, the average weekly earnings shall be taken as 100 percent of the aggregate of such earnings from all employments computed in terms of one week; but the earnings from employments other than the employment in which the injury occurred shall not be taken at a higher rate than the hourly rate paid at the time of the injury.

(c) If the earnings are at an irregular rate, such as piecework, or on a commission basis, or are specified to be by week, month or other period, then the average weekly earnings mentioned in subdivision (a) above shall be taken as 100 percent of the actual weekly earnings averaged for such period of time, not exceeding one year, as may conveniently be taken to determine an average weekly rate of pay.

(d) Where the employment is for less than 30 hours per week, or where for any reason the foregoing methods of arriving at the average weekly earnings cannot reasonably and fairly be applied, the average weekly earnings shall be taken at 100 percent of the sum which reasonably represents the average weekly earning capacity of the injured employee at the time of his injury, due consideration being given to his actual earnings from all sources and employments."

Labor Code, State of California

"§4458. *Volunteer fire department member, or person engaged in fire suppression, suffering injury or*

death in performance of duty: Average weekly earnings: Four times annual earnings: Inmate of penal institution

(a) Except as provided in subdivision (b), if a member registered as an active firefighting member of any regularly organized volunteer fire department as described in Section 3361 suffers injury or death while in the performance of his duty as fireman, or if a person engaged in fire suppression as described in Section 3365 suffers injury or death while so engaged, then, irrespective of his remuneration from this or other employment or from both, his average weekly earnings for the purposes of determining temporary disability indemnity and permanent disability indemnity shall be taken at the maximum fixed for each, respectively, in Section 4453. Four times his average annual earnings in disability cases and in death cases shall be taken at the maximum limits provided in Sections 4452 and 4702 respectively.

(b) In the case of an inmate of a penal or correctional institution who is deemed to be an employee under Section 3365, irrespective of his remuneration, his average weekly earnings for the purposes of determining temporary disability indemnity and permanent disability indemnity shall be taken at the minimum fixed for each, respectively, in Section 4453. Four times his average annual earnings in disability cases shall be taken at the minimum limit provided in Section 4452.

(c) An inmate of a state penal or correctional institution who is deemed to be an employee under

Section 3365 is not entitled to receive benefits under this division during the period he is confined in such institution, and the actual period of his confinement after the injury shall be offset against the period for benefits to which he is entitled under this division. Upon parole or release from the state penal or correctional institution, the inmate is entitled to such benefits for the remainder of the benefit period not so offset."

QUESTIONS PRESENTED

1. Whether there is a reasonable basis for the minimum earnings provision of California Labor Code Section 4458 in conformity with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

2. Whether the minimum earnings provision of California Labor Code Section 4458 meets the standards of legislative reasonableness in conformity with the Due Process Clause of the Fourteenth Amendment?

STATEMENT OF THE CASE

On April 16, 1974, while committed to the custody of the California Department of Corrections, Petitioner became totally disabled while felling a tree during fire prevention activities for the Division of Forestry. The workers' compensation judge found that the provisions of Labor Code Section 4458(b), which established the weekly earnings rate of convicts en-

gaged in firefighting activities at a minimum, were unconstitutional. Petitioner was awarded benefits at the maximum disability rate. The Workers' Compensation Appeals Board reversed the workers' compensation judge and found that Labor Code Section 4458 (b) was not unconstitutional.

The applicant sought review. The California Court of Appeal, Fourth Appellate District, Division Two, issued an Opinion, holding *inter alia,* that subdivision (b) of Labor Code Section 4458 was unconstitutional in that the granting of minimum benefits to prisoner firefighters while similarly situated volunteer firefighters are given maximum benefits is a denial of equal protection of the laws.

Respondents filed a Petition for Hearing in the Supreme Court of the State of California. The Supreme Court reversed the Court of Appeal holding that (1) the categorization of incarcerated convicts from other members of society does not create a suspect classification and (2) that the minimum earnings provision of Labor Code Section 4458 was rationally related to a legitimate state interest and, therefore, did not violate the Equal Protection Clause of either the California or the United States Constitution.

REASONS FOR DENYING THE WRIT

A. THERE IS A REASONABLE BASIS FOR THE MINIMUM EARNINGS PROVISION OF LABOR CODE SECTION 4458 AND, THEREFORE, SECTION 4458 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

At the time of Petitioner's injury Labor Code Section 4458[2] established special rules for purposes of computing the disability compensation of volunteer firefighters. Subdivision (a) provided that the earnings component for non-convict firefighters shall be fixed at maximum irrespective of their earnings from firefighting or other employment. Subdivision (b) provided that the earnings component of convict firefightfighters shall be at a minimum, and subdivision (c) provided that the convict shall receive no compensation benefits while confined in a penal institution.

The question before the Court today concerns whether the minimum earnings provision of Labor Code Section 4458 violates the Equal Protection Clause of the United States Constitution.

It is quite obvious from the outset that all laws are to some extent inherently unequal. Almost every statute or governmental regulation involves some disparity in treatment. The Equal Protection Clause does *not* require that all persons be treated equally under the law at all times. Rather, the essence of the constitutional guarantee is simply that whatever classifications are made in a statute be *reasonable.*

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[2]Section 4458 has since been amended. (Stats. 1976 ch. 1347, §7.)

As the Court stated in *Dandridge v. Williams,*[3]

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classification made by its laws are imperfect. If the classification has some 'reasonable basis', it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality' [citation]. 'The problems of government are practical ones and may justify, if they do not require, rough accomodations—illogical, it may be, and unscientific' [citation]."

The Court has established two distinct standards for determining the reasonableness of statutory classifications for equal protection purposes. If the statutory classification affects a "suspect class" or a "fundamental right" the State must show that the law serves a compelling state interest and is the least burdensome alternative available.[4]

Where no "fundamental right" or "suspect class" is involved in the statutory classification the Court will uphold the law if the classification bears a rational relationship to a legitimate state interest.[5] Under this standard of judicial review the state's law are accorded a presumption of constitutionality.[6]

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[3]397 U.S. 471, 485 (1970).

[4]*Loving v. Virginia,* 388 U.S. 1, 11 (1967) (suspect class); *Shapiro v. Thompson,* 394 U.S. 618, 638 (1969) (fundamental right).

[5]*San Antonio School District v. Rodriguez,* 411 U.S. 1, 40 (1973).

[6]*Id.* at 44.

Petitioner asserts that both a "suspect class" and a "fundamental right" exist in this case. Petitioner cites *Procunier v. Martinez*[7] for the proposition that prisoners constiute a suspect classification. However, no case, including *Procunier,* has held that prisoners comprise a suspect class. *Procunier* dealt with prison regulations censoring prisoner mail and banning the use of law students and paraprofessionals to conduct attorney-client interviews with prisoners. The Court held that such regulations violated the First Amendment guarantee of free speech and the Fourteenth Amendment right to procedural due process. The case was not decided on Equal Protection grounds and the Court did not indicate in any way that prisoners were to be regarded as a "suspect class."

Petitioner also asserts that the right to workers' compensation constitutes a fundamental right. However, a right is considered fundamental only if it is *explicitly* or *implicitly* guaranteed by the Constitution.

As the Court stated in *San Antonio School District v. Rodriguez*[8] (quoting Mr. Justice Stewart in *Shapiro v. Thompson*):

> "The Court today does *not* 'pick out particular activities, characterize them as "fundamental", and give them added protection . . .' To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands [citation]." [Emphasis in original].

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[7]416 U.S. 396 (1974).

[8]*Supra* at 31.

The Court has recognized the right to vote,[9] the right to interstate travel,[10] and the right to privacy[11] as fundamental rights explicitly or implicitly guaranteed by the Constitution. On the other hand, the right to housing,[12] welfare,[13] or education.[14] Since the Court has determined that such subsistence rights as housing and welfare are not "fundamental interests" guaranteed by the Constitution, it seems unlikely that the right to workers' compensation would be regarded as a fundamental right guaranteed by the Constitution.

Since there is neither a "suspect class" nor a "fundamental interest" in this case, it is apparent that the correct standard of review is the rational basis test, i.e. does the minimum earnings provision of Labor Code Section 4458 bear a rational relationship to a legitimate state interest. Respondents assert that it does.

By enacting Labor Code Section 4458(a) it is apparent that the California Legislature intended (1) to provide a liberal disability compensation program to counterbalance any sacrifice in earnings power that a civilian volunteer firefighter made to engage in firefighting activity and (2) to provide an incentive to engage in an important public service.

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[9]*Williams v. Rhodes*, 393 U.S. 23 (1968).

[10]*Shapiro v. Thompson*, 394 U.S. 618 (1969).

[11]*Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973).

[12]*Lindsay v. Normet*, 405 U.S. 56 (1972).

[13]*Dandridge v. Williams, supra.*

[14]*San Antonio School District v. Rodriguez, supra.*

When the Legislature regarded the category of prisoner firefighters, however, it appeared that some very real differences existed between volunteer civilian firefighters and prisoner firefighters. First, firefighting does not deprive prisoners of the opportunity for earnings. Secondly, incentives exist for prisoners to engage in firefighting that are not applicable to non-prisoners. For example, a prisoner who engages in firefighting satisfies prison work requirements and demonstrates, in a very dramatic fashion, his desire to assume a productive role in society. Finally, the prisoner ordinarily would not qualify for more than minimum disability compensation under the basic test for computing disability compensation. Permanent disability benefits are based on the nature and extent of disability and earnings. Within a statutory minimum and maximum range, the earnings component is fixed on the basis of actual earnings at the time of injury unless employment is for less than 30 hours a week or unless prior earnings cannot be reasonably and fairly applied.[15] In the latter situation, earnings capacity—including potential future earnings—shall be considered.[16] Since the prisoner has removed himself from the competitive labor market, he has neither significant earnings nor earning power at the time of injury and, therefore, under the basic test, the prisoner would not qualify for more than minimum disability compensation. Furthermore, the normal

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[15]California Labor Code Section 4453.

[16]*Goytia v. Workmen's Comp. App. Bd.*, 1 Cal.3d 889, 894 *et seq.* (1970); *Goytia v. Workmen's Comp. App. Bd.*, 6 Cal.3d 660, 663 *et seq.* (1972).

obstacles faced by ex-prisoners in seeking employment upon release make any attempt to use the secondary measure—his earning capacity—speculative.

In the end, the Legislature decided to give prisoner firefighters some disability benefits in contrast to other working prisoners who were excluded from the workers' compensation system.[17] However, the Legislature chose to limit these disability benefits. Faced with the above considerations it was not unreasonable for the California Legislature to conclude that, for compensation purposes, prisoner firefighters should not be classified with other injured volunteer firemen *or* with other injured prisoners, but rather with those injured in private employment whose earnings were at or below the minimum.

B. THE MINIMUM EARNINGS PROVISION OF LABOR CODE SECTION 4458 MEETS THE STANDARDS OF LEGISLATIVE REASONABLENESS AND, THEREFORE, DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Petitioner asserts that the minimum earnings provision of Labor Code Section 4458 creates an irrebuttable presumption thereby denying Petitioner an evidentiary hearing on his earning capacity in violation of the Due Process Clause of the Fourteenth Amendment.

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[17]Former California Penal Code Sections 2700, 2766, 2791. These code sections were amended while this case was pending. (Stats. 1976, ch. 1347 §§9, 10, 11.)

Respondents disagree with this analysis. It should be noted that almost any statutory classification can be regarded as an "irrebuttable presumption". Carried to an extreme the analysis forbids a system of government based on general rules of law, and requires individualized hearings for every case in which government imposes a burden or denies a benefit.[18]

The Court recognized this problem with the irrebuttable presumption analysis in *Weinberger v. Salfi*.[19] *Salfi* dealt with a federal statute which defined a "widow" and "child" so as to exclude from social security benefits a surviving wife or stepchild who was related to a deceased wage earner for less than nine months prior to his death. The District Court held that the statute created an irrebuttable presumption that such marriages were entered into for the purpose of securing Social Security benefits. As such the statute was unconstitutional because it presumed a fact which was not necessarily or universally true. The Supreme Court reversed the District Court, rejecting the irrebuttable presumption analysis and indicating that the Due Process Clause was not violated if the classification had a rational relationship to a legitimate state goal. Quoting *Fleming v. Nestor*,[20] the Court stated:

> "Particularly when we deal with a withholding of a non-contractual benefit under a social welfare

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[18]See Mr. Justice Rehnquist's discussion of irrebuttable presumptions in his dissent to *Cleveland Board of Education v. La Fleur*, 414 U.S. 632, 657 (1974).

[19]422 U.S. 749 (1975).

[20]363 U.S. 603, 611 (1960).

> program such as [Social Security], we must recognize that the Due Process Clause can be thought to interpose a ban only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification."[21]

Labor Code Section 4458 deals with a classification in the area of social welfare. As such the classification does not violate the Due Process Clause of the Fourteenth Amendment because, as we have pointed out in Section A of our argument, there is a rational and justifiable basis for such a classification.

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,
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[21] *Weinberger v. Salfi, supra* at 768.